SUPREME COURT, U.S.
SEP 4 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 204

WILLIAM B. F. HALL, AILEEN HALL SHOAFF, ARTHUR F. HALL, JR., ALVA J. McANDLESS, FRED B. SHOAFF, II,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION.

CLYDE J. COVER,
The Lincoln National Life
Insurance Company Building,
Fort Wayne, Indiana,
Attorney for Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 204

WILLIAM B. F. HALL, AILEEN HALL SHOAFF, ARTHUR F. HALL, JR., ALVA J. McANDLESS, FRED B. SHOAFF, II,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION.

To The Honorable, The Chief Justice of the United States, and The Associate Justices of the Supreme Court of the United States.

This brief is submitted pursuant to the right accorded Petitioners under the Revised Rules of this Court, specifically, Rule 24(4). Its format will be a series of statements concerning those parts of Respondent's Brief in Opposition to which Petitioners take exception. Unless otherwise indicated, page references will be to Respondent's Brief in Opposition.

STATEMENTS IN REPLY

1. The statements at the top of page 5 paraphrase a portion of the District Court's opinion; they are not a part of the Stipulation of Facts between the parties. To the extent that such statements are true and relevant, their import can only be determined from the evidence from which they were extracted.

2. In the first complete paragraph on page 5, Respondent asserts that "notice of sickness was to be given that Department." (Personnel Department) Proof that this statement is untrue is forthcoming from the text of the Employees' Life Insurance Plan, set out on pages 26 to 29 of the Appendix to Plaintiffs' Brief below. The Plan provided for a benefit payable in event of sickness, but no conditioning notice was required or even mentioned.

3. Respondent, on page 5 of its Statement of Fact, draws copiously from the District Court's opinion. The District Court, in considering the question whether the $2,400 amount was paid as salary or as an insurance benefit, gave much attention to the employer's office procedures, overlooking the fact that such procedures could not affect in the least Hall's right to a contractual insurance benefit. The Employees' Life Insurance Plan did not require that formal notice of illness be given, nor that the claim be approved in a prescribed manner, nor that the benefit be paid with a special check. The Court, however, presumed such conventional prerequisites, and upon such presumptions and their alleged want of fulfillment, found that the $2,400 was salary, not an insurance benefit. The Employees' Life Insurance Plan simply stated that "Those full-time salaried * * * employees who are on the regular Home Office payroll, and who, preliminary to or at the time of employment are able to pass a satisfactory medi-

cal examination, are considered eligible for free sickness and death benefits." (Page 26, Appendix to Plaintiffs' Brief.) Hall, on becoming ill, became entitled to the benefit notwithstanding any post-mortem findings concerning the employer's office procedures and compliance or non-compliance therewith.

4. On page 6 the Respondent, in opening its argument on the assignment issue, states:

> "This is another case presenting the question whether the incidence of taxation can be shifted from one person to another by means of an anticipatory assignment of income."

This statement, which closely parallels the opening statement of the Circuit Court of Appeals in its opinion, seems to stigmatize the shifting of income tax incidents through the legal process of assignment, and this, in the face of the fact that commerce would be frozen in its tracks if freedom in making such shifts were restrained or restricted. Petitioners concede that anticipated income, apart from its property source, cannot be assigned with a resulting shift of its income tax incidents, but they contend with unabashed candor that the subject of this lawsuit is an absolute and unconditional assignment of property which has the effect of shifting the income tax incidents of the property assigned.

5. On page 6 the Respondent asserts, "In *Helvering* v. *Eubank* * * * this Court was presented with a case involving facts which were identical in all material respects to those presented here." The ineptness of this statement will be immediately evident if it is considered that, under the facts of this case, an absolute and unconditional assignment of salary and commission contract is involved, whereas, in the *Eubank* case there were two separate as-

signments, one involving a commission contract and its potential future income, the other involving only the potential future income of a commission contract.

6. Petitioners accept as true Respondent's statement on page 6 concerning the *Eubank* case, reading as follows:

> "This Court, without distinguishing between the transfer of the commissions and the transfer of the underlying contract, held that the assignments were not effective to cause the commissions to be taxed as income to the assignee rather to the assignor who had earned them."

The jurisdictional basis for Petitioners' petition could not be better stated. The scope of the authority of the *Eubank* case must remain in doubt until this Court defines the meaning of its cryptic opinion in that case. Petitioners for reasons outlined in its Petition, hold to the view that the Court intended to deal only with the situation presented when future income, apart from its property source, is assigned, but Respondent with equal vigor contends otherwise.

7. At the beginning of the first complete paragraph on page 7, Respondent asserts: "Although the Petitioners admit that Eubank is identical with this case, they contend * * * (Pet. 11)." This assertion is untrue. Petitioners' entire case on the assignment issue is based upon the conviction that the *Eubank* case is not identical with this case. The Respondent asserted the *Eubank* case as authority for the income tax assessment in issue and Petitioners over the years, in every proceeding, whether administrative or judicial, have steadfastly contended that the facts of this case are distinguishable from the facts on which the Court predicated its decision in the *Eubank* case. How then can Respondent say that Petitioners admit that this case is identical with the *Eubank* case?

8. In the paragraph beginning at the middle of page 7, Respondent offers an occult discussion concerning the differences legally of a transfer of income originating in an obligation to pay compensation, and a transfer of income producing property. Rather than to attempt to weigh line by line such discussion, Petitioners prefer merely to restate these facts: Hall's contract with the Lincoln was essentially for a share of his employer's earnings; for each year of qualified service he received a credit expressed in terms of an interest in his employer's life insurance business; after fifteen years the contract became fully executed, with nothing remaining to be done thereafter by Hall; some thirteen years later the assignment in question was made, leaving no ownership, dominion or right in Hall respecting commissions thereafter accruing. Without resort to theories or rhetorical phrases, Petitioners are willing to rest their case upon the broad principle that property may exist in a contract, license, patent, copyright or in other expressed human relations when it has economic value over which the owner can exercise dominion and control. When property as so conceived is transferred, absolutely and unconditionally, the transferee succeeds to all the rights, privileges and burdens belonging to the transferor prior to the assignment.

9. In the footnote at the bottom of page 7, Respondent reasons that Petitioners cannot here assert the doctrine of *Blair* v. *Commissioner* to any greater advantage than the same doctrine was asserted in the *Horst* case. The things assigned in the *Horst* case were bond interest coupons, *ex* the parent bonds. Here the entire contract was assigned with all if its income producing potential. How, therefore, can Respondent advance such a course of reasoning, predicated as it is upon a false premise?

10. At the top of page 8 Respondent attempts to establish that this Court, when it had the *Eubank* case before it, gave consideration to the fact that one of the assignments involved an outright transfer of the property *res*. Petitioners do not share this view but rather it is their belief that the Court, while recognizing that one of the assignments involved an outright transfer of property, nevertheless considered the case strictly on the assumption that only an assignment of income was involved, such being the basis on which the case was submitted by the parties. In support of this belief the following considerations are offered:

(a) The Court stated in the first paragraph of its opinion:

"This is a companion case to *Helvering* v. *Horst*, 311 U.S. 112, 61 S. Ct. 144, 85 L. E. 75, decided this day, and presents issues not distinguishable from those in that case."

The *Horst* case involved only an assignment of interest coupons apart from their source of economic value, the bonds. It must be reasoned, therefore, that the Court's statement was predicated upon the only factual issue presented by the parties, namely, an assignment of the right to collect income in the future, *ex* the property *res*.

(b) The Court stated in its opinion:

"No purpose of the assignment appears other than to confer on the assignees the power to collect the commissions, which they did in the taxable year. The Government and Respondent have briefed and argued the case here on the assumption that the assignments were voluntary transfers to the assignees

of the right to collect the commissions as and when they became payable, and the record affords no basis for any other."

This is a carefully worded statement by the Court of the predicates of its decision. Either sentence would have been adequate but seemingly two were used in order to remove any possible doubt concerning the basis and effect of the decision.

(c) The Board of Tax Appeals, 39 B.T.A. 583 at pages 587 and 588, described the issues of the case in this fashion:

"Respondent urges that the question be considered in its broad aspect rather than upon any possible distinctions between the form of the assignment made in 1924, of the interest in the contract, and the one made in 1928, of the commissions. * * * Petitioner contends that he is not taxable on the commissions paid in 1933 upon either or both of the following arguments: (a) He contends that the commissions were fully earned prior to the assignments, his services having been performed fully, so that the assignment was of 'past earnings' and, therefore, the tax liability is on the assignee. * * * (b) The right to receive future commissions was a type of property *in praesenti* at the time of the assignment, which may be assigned, and the commissions, when paid, vest in the assignee and are taxable to him."

(d) The Circuit Court of Appeals, 110 F. 2d 737, at page 738, stated the issue before it in this manner:

"The question presented is whether renewal commissions payable to a general agent of a life insurance company after the termination of his agency and by him assigned prior to the taxable year must be included in his income despite the assignment."

(e) Eubank as Respondent before this Court stated his position in this manner:

"2. The contract right to receive the renewal commissions in question, even though it may have resulted from services of the assignor, constituted a property right capable of assignment; and the disposition of the right did not correspond to an assignment of earnings." (Brief for Respondent, Case No. 205, October Term, 1940)

(f) The Circuit Court of Appeals rested its decision in favor of Eubank on the principal that commissions, *qua* commissions, once earned constitute property and, as such, may be transferred, *ex* the parent contract, and in so doing, shift their income tax incidents for the future. The Court's statement on this subject, set forth on page 738 (110 F. 2d 737) reads as follows:

"In the case at bar the Petitioner owned a right to receive money for past services; no further services were required. Such a right is assignable. At the time of assignment there was nothing contingent in the Petitioner's right, although the amount collectable in future years was still uncertain and contingent. But this may be equally true where the assignment transfers a right to income from investments as in *Blair* v. *Commissioner* * * *. By an assignment of future earnings a taxpayer may not escape taxation upon his compensation in the year when he earns it. But when a taxpayer who makes his income tax return on a cash basis assigns a right to money payable in the future for work already performed, we believe that he transfers a property right, and the money, when received by the assignee, is not income taxable to the assignor."

(g) The separate opinion written by Justice McReynolds and concurred in by Chief Justice Hughes and Justice Roberts, approved the decision of the Court of Appeals and, hence, did not require a differentiation between the two assignments.

Petitioners believe that the foregoing enumeration completely refutes the statement of Respondent under consideration. It is not difficult to understand why Eubank chose to rest his case upon the principle that an assignment of income alone constitutes a transfer of property. There were two assignments involved in his case, one relating to the transfer of the contract as a piece of property and the other relating solely to an assignment of income. By contending that the assignment of income alone constituted a transfer of property he took his stand on the broadest principle in sight, knowing that it would extend to the situation of the other assignment. The use of the broader principle was also commended to Eubank by the fact that the assignment involving solely income was nearly four times as valuable as the assignment involving the assignment of the total commission contract.

11. In a note at the bottom of page 8 of its Brief, Respondent asserts that the case of *Hall* v. *Burnet*, 54 F. 2d 443 (C.A.D.C.), considered on pages 13 and 14 of Petitioners' Brief, was rejected by this Court in the *Horst* and *Eubank* cases. To this assertion Petitioner replies: "(a) That in neither of said cases was the *Hall* case once mentioned, and (b) that the *Horst* case clearly involved only an assignment of income, *ex* the parent bond, and (c) that in Petitioners' view of the *Eubank* case, as presented by the parties, likewise involved only an assignment of income." Petitioner submits, therefore, that the *Hall* case was not repudiated by the *Horst* or *Eubank* cases, either

expressly or by virtue of the principle of said cases. Of course, Petitioner recognizes that the doctrine of the *Eubank* case is here in question and, hence, its statement at the top of page 15 of its Brief reading: "Petitioner recognizes that this point 3 is only pertinent if their position concerning the meaning of the *Eubank* decision is determined to be correct."

12. It should be noted that Respondent, excepting only for the brief note considered immediately above in relation to the *Hall* case, offered nothing save silence concerning Petitioners' discussion on pages 12, 13 and 14 of their Petition, which review decisions of this Court after *Eubank*, explaining that decision, either expressly or by their rationale in relation to the facts presented.

13. At the bottom of page 8, Respondent asserts the case of *Comstock* v. *Group of Investors*. Petitioners do not question the authority of said case but in their view it has no effect when, under the law established by this Court, the findings of the lower Court are irrelevant.

14. Concerning the discussion beginning at the top of page 9 of Respondent's Brief and continuing to its end, Petitioners are content to stand upon their Petition, except for those additional observations: (a) Section 22(b)5 of the Internal Revenue Code excludes from gross income "amounts received, through accident or health insurance * * * as compensation for personal injuries or sickness." * * * Nothing at all is said about the insurance benefit being in consideration for an economic loss through salary or wage discontinuance. (b) Under the Lincoln's Employees' Life Insurance Plan the only condition to sickness benefits is a condition of illness. Again, nothing is said about the employee's activities although, of course, such activities would constitute evidence of health and physical con-

dition, and (c) The District Court and the Circuit Court of Appeals in their decisions presumed to rewrite the insurance contract and the Code provision by injecting an employment test, and this in the face of the fact that Half was clearly sick, even unto death.

Respectfully submitted,

CLYDE J. COVER,
Attorney for Petitioners.